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FEDERAL COURT OF AUSTRALIA

Norman v Staatz, in the matter of Wollumbin Horizons Pty Ltd (in liq) [2020] FCA 521

Appeal from:	*Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq)* (No 3) [2019] FCA 924
File number:	QUD 429 of 2019
Judge:	**REEVES J**
Date of judgment:	22 April 2020
Catchwords:	**CORPORATIONS** – appeal from a judgment of the Federal Court of Australia – where directions were given by the Court to the liquidator about the liquidation of the company – where appellant attempted to introduce other issues in that application – where the appellant failed to identify error in the primary judgment – appeal dismissed **PRACTICE AND PROCEDURE** – application by the liquidator for summary judgment under s 31A of the *Federal Court of Australia Act 1976* (Cth) – whether the appeal has reasonable prospects of success – application granted
Legislation:	*Corporations Act 2001* (Cth) *Federal Court of Australia Act 1976* (Cth) *Real Property Act 1900* (NSW) *Trustee Act 1925* (NSW)
Cases cited:	*Eliezer v University of Sydney* (2015) 239 FCR 381; [2015] FCA 1045 *Kimber v Owners of Strata Plan No 48216* (2017) 258 FCR 575; [2017] FCAFC 226 *Kulik v Administrative Appeals Tribunal* [2009] FCA 1324 *Staaz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq)* ([2018] FCA 1090) *Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq)* (No 3) [2019] FCA 924
Date of hearing:	5 March 2020
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency

Category:	Catchwords
Number of paragraphs:	21
Counsel for the Appellants:	The Appellants each appeared in person
Counsel for the First Defendant:	Mr C Jennings
Solicitor for the First Defendant:	Patane Lawyers
Counsel for the Second to Eighth Defendants:	The Second to Eighth Defendants did not appear

ORDERS

QUD 429 of 2019

IN THE MATTER OF WOLLUMBIN HORIZONS PTY LTD (IN LIQUIDATION)
ACN 606 581 364

BETWEEN: **GILLIAN LINDA NORMAN**
First Appellant

RON BERRY
Second Appellant

AND: **STEVEN NEVILLE STAATZ AS LIQUIDATOR OF WOLLUMBIN HORIZONS PTY LTD (IN LIQUIDATION) ACN 606 581 364**
First Defendant

EMANUELE AGUS
Second Defendant

MELISSA HIRSCH (and others named in the Schedule)
Third Defendant

JUDGE: **REEVES J**

DATE OF ORDER: **22 APRIL 2020**

THE COURT ORDERS THAT:

1. The notice of appeal filed on 17 July 2019 is dismissed.

2. The appellants are to pay the first defendant's costs of the application filed on 14 August 2019 and of this appeal to be taxed failing agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

REEVES J:

1. Mr Steven Staatz is the liquidator of the company Wollumbin Horizons Pty Ltd (in liquidation) (Wollumbin Horizons). He has applied under s 31A of the *Federal Court of Australia Act 1976* (Cth) (the FCA) to summarily dismiss an appeal filed by Ms Gillian Norman and Mr Ronald Berry against a judgment of a single judge of this Court delivered on 20 June 2019 ([2019] FCA 924).

2. That judgment resulted from an application Mr Staatz made under ss 90-15 or 45-1 of Schedule 2 to the *Corporations Act 2001* (Cth) (the Act) or ss 63 and 93 of the *Trustee Act 1925* (NSW). The judgment included a series of orders giving directions to Mr Staatz in respect of the liquidation of Wollumbin Horizons and, among many other things, his treatment of a block of land in northern New South Wales, just south of the Queensland border, which is currently registered in the name of that company.

3. The factual background to this matter is complex. It is conveniently summarised in the primary judgment at [3]–[5] as follows:

> 3 In brief terms this case concerns the activities of Mr Mark Darwin and his associates who promoted a scheme for the establishment of a form of commune called the "Bhula Bhula Community" or the "Bhula Bhula Community Village" on land in northern New South Wales. All members were to contribute to the cost of its establishment, acquisition and operation. Apparently, this form of co-habitation on a single parcel of land is not uncommon in the north-eastern parts of that State. The persons intending to participate in the Community were told that, by reason of their financial contributions to the scheme, they would acquire an interest in the land on which it was to be situated, and that it was a place where they were each entitled to establish a residence. The initial subscribers were also told that the funds which they paid would be held on trust pending the purchase of the land and other related matters. A substantial amount of money was amassed by Mr Darwin, the Company was incorporated, and it purchased the land in its name. Some of the funds received from early subscribers were used to purchase the land. Borrowed funds were also used and a mortgage over the land was granted to the lender to secure repayment. Subsequently, additional persons were induced to become members of the Community by subscribing money on the faith of securing a right to reside in the commune and acquiring an interest in the land. Some of the funds advanced by those persons were used to discharge the mortgage. Following that, further persons were likewise induced to pay money for the right to be part of the Community and to acquire an interest in the land. By that time, however, the purchase price of the land and the mortgage debt had been fully discharged.
>
> 4 It is important to keep in mind that each person who became a Community member did so on the understanding that others who paid their subscriptions and who became members would also have an interest in the Community land. That was so regardless of whether they were initial subscribers whose money was used to pay the purchase price, or whose subscribed money was used to pay the mortgage, or whose money was received after the acquisition of the land and was intended to be used to maintain and improve the land. There was, in effect, a quasi-domestic, joint endeavour or enterprise pursuant to which the Community would be established, maintained and operated with each member having ownership of the land on which it was situated. Perhaps one characteristic which sets this case apart from others is that the membership of the joint endeavour expanded over time and all whom now claim an interest in the land on which the Community was established were not original members of the Community whose money was paid towards the acquisition of the land.
>
> 5 Mr Darwin, and others involved in the promotion of the Community, informed potential Community members they would have an interest in the land by way of a unit in a unit trust of which a company would be trustee. Although some steps were taken to establish the unit trust, which was to underpin the operations of the Community, no valid unit trust to which the land was subject was effected. The proposed commune failed, not in the least because the local town planning approvals required for multiple dwellings to be erected on the land had not been obtained. The Company incurred substantial debts and became insolvent. In the present proceedings, the Liquidator seeks the Court's guidance as to the manner in which the Company holds the title to the land and how, in respect of the land, the Company's liquidation is to proceed.

4. Mr Staatz was appointed as the administrator of Wollumbin Horizons on 4 July 2017 pursuant to s 436A of the Act. At the second meeting of creditors, it was resolved that the company be wound up and that he be appointed as its liquidator.

5. The primary judgment contains a detailed and lengthy analysis of the activities of Wollumbin Horizons and, in particular, its director, Mr Darwin. Following that analysis, his Honour explained why he concluded that the putative unit trust mentioned above (at

[3(5)]) was invalid, that Wollumbin Horizons therefore held the land as a bare trustee under a constructive trust and how Mr Staatz should go about calculating the interests of the beneficiaries of that trust.

6. In the course of that analysis, the primary judge recorded the liquidator's views about the contributions made to the purchase of the property by various persons. At [103(i)], his Honour recorded that the liquidator accepted that Ms Norman "paid money for the purposes of acquiring a unit in the unit trust and that her money was used to discharge the loan taken to secure the land". On the other hand, his Honour included Mr Berry in a group of persons in respect of whom the liquidator still needed to assess what subscriptions, if any, had been made by them (at [104]). This conclusion makes Mr Berry's inclusion as an appellant in this appeal particularly problematic. Accordingly, in what follows, I will focus on Ms Norman's involvement.

7. Section 31A of the FCA allows the Court to give judgment to a party against another "in relation to the whole or any part of a proceeding". The word "proceeding" is defined in s 4 of the FCA to include an appeal. It has therefore been held that s 31A applies to appeals (see *Kulik v Administrative Appeals Tribunal* [2009] FCA 1324 at [1] per Finn J).

8. The principles bearing on an application under s 31A have been reviewed on numerous occasions (see, for example, more recently Perry J in *Eliezer v University of Sydney* (2015) 239 FCR 381; [2015] FCA 1045 at [35]–[39] (approved by the Full Court in *Kimber v Owners of Strata Plan No 48216* (2017) 258 FCR 575; [2017] FCAFC 226 at [62])).

9. With one exception, none of Ms Norman's grounds of appeal, nor the 16 paragraphs of her notice of appeal that precede those grounds, are directed to identifying alleged error in the primary judgment. Instead, they are all directed to Ms Norman's failed attempt at the interlocutory stages of this proceeding to turn the liquidator's application into an examination of Mr Darwin's conduct of the affairs of Wollumbin Horizons. As to that attempt, it is important to record that, from the outset, the primary judge decided to define the issues to be determined at the hearing of the liquidator's application. That occurred on 26 March 2018, when his Honour ordered that (Order 4):

> Subject to further order, the issues to be determined at the hearing of this proceeding will be limited to whether:
>
> a. the applicant is entitled to the relief sought in the originating process filed on 1 February 2018; and
>
> b. whether Stuart Newman, Emanuele Agus and Melissa Hirsch be granted the relief sought in paragraphs 30, 31 and 33 in their Concise Statement filed on 23 March 2018.

10. It was in an attempt to broaden the above issues so that they included an examination of Mr Darwin's conduct that Ms Norman filed a proposed notice of cross-claim on 18 May 2018. His Honour rejected that attempt on 11 July 2018 when he made a further set of interlocutory orders in which, among other things, he struck out Ms Norman's proposed notice of cross-claim (Order 2). In his reasons for that judgment ([2018] FCA 1090), his Honour described the purpose of Ms Norman's proposed cross-claim in the following terms (at [4]):

> On 29 May 2018 [sic] Ms Gillian Linda Norman (Ms Norman) filed a document called a Notice of Cross-Claim. She also filed with it an Interlocutory Application which seeks orders that persons referred to as cross-claimants be joined as such to the proceedings and other similar relief. So far as can be ascertained, the essence of the application today is for orders that Ms Norman have leave to commence a cross-claim against the liquidator and to join 15 other persons as cross-claimants. The cross-respondents to the proposed action are said to be the liquidator and persons who are or were involved in the scheme through which the land was acquired, being Mr Adrian Brennock, Mr Mark Darwin and Mr Phillip Dixon. The Notice of Cross-Claim also seeks, amongst other things, orders for a stay of the winding-up of Wollumbin pending the determination of a cross-claim, and a stay of the liquidator's application under s 90-15 of Schedule 2 of the *Corporations Act*.

11. At [19] and [20], his Honour then summarised the evidence Ms Norman sought to adduce in support of her proposed cross-claim as follows:

> 19 In general terms, the evidence Ms Norman seeks to adduce is that the subscribers were told that the property would be acquired and held on trust. It seems that it was always envisaged that Wollumbin or a company associated with it would acquire the land. It was also apparently envisaged that the entire shareholding in Wollumbin would be transferred to an incorporated association which consisted of community members. In that way, those community members would have control of the trust company which legally owned the land. It was also said that the subscribers were told that they would have ownership in the land. Had the scheme as represented been implemented at least, in the manner that Ms Norman has described it, it would seem that the subscribers would indeed have had a beneficial interest in the land as beneficiaries of a trust.

> 20 Many of the other allegations in Ms Norman's affidavit concern alleged misconduct by the directors of Wollumbin and, in particular, that they engaged in misleading or deceptive conduct.

12. At [21], his Honour also noted that Ms Norman's affidavit and written submissions included "a number of unsubstantiated allegations against the liquidator". His Honour proceeded to reject all those allegations at [26]–[41], concluding as follows (at [41]):

> It follows that the claims against the liquidator have no chance of success and should not be allowed to be pursued. There is no substance in them and they have obviously been raised for the purposes of vexing the liquidator.

13. His Honour then turned to consider the allegations Ms Norman had made against a number of other persons in her proposed cross-claim and concluded (at [43]) as follows:

> It is recognised that, to some extent, the allegations they make are connected with the questions the liquidator wishes to have determined. However, it does not follow that those matters must necessarily be litigated in the same proceedings. As I have indicated, the pursuit of the proceedings against the former directors of Wollumbin will delay the liquidator's action for some time. Any such claims will remain, subject to any limitation period, and can be pursued subsequently and/or separately. Indeed, it is very likely that [the] liquidator's proceeding will crystallise the subscriber's rights to some extent.

14. As is already mentioned above, his Honour ultimately concluded that Ms Norman's proposed notice of cross-claim should be struck out and the various allegations Ms Norman had made against the liquidator, which his Honour described as "both vexatious and scandalous", should be removed from the Court's file. His Honour expressed these conclusions in the following terms (at [46] and [47]):

> 46 For these reasons, I am prepared to direct the cross-application be struck out as the liquidator has sought. He also seeks orders that it be removed from the court file pursuant to r 16.21 of the *Federal Court Rules* or s 23 of the *Federal Court of Australia Act*. I agree with the substance of that submission. For the reasons which I have indicated above, the proposed cross-claim is unnecessary. Moreover, the unsubstantiated and unparticularised allegation[s] against the plaintiff are both vexatious and scandalous and they ought not be entitled to stand as a public record.
>
> 47 The appropriate order is, however, not that the documents be removed from the Court file, but that the documents, being Ms Norman's cross-claim filed 29 May 2018 [sic] for interlocutory application to join the parties to the main proceedings, her affidavit of 24 May 2018, her submissions of 3 July 2018 and her further submissions filed 10 July 2018 [be] marked as "suppressed" on the Federal Court Electronic File and it be ordered that they are not to be accessed other than by leave of the Court.

15. Lest it be thought that the primary judge had exonerated Mr Darwin, it is worth noting the following observations his Honour made in the primary judgment (at [16] of [2019] FCA 924):

> In early 2014, Mr Darwin engaged in promoting a scheme for the establishment and operation of a commune referred to as the "Bhula Bhula Community". He did so with his close associate, Mr Adrian Brennock, and they worked closely together on the project. As the facts below establish, Mr Darwin was the driving force and controller of the scheme and, for all relevant purposes, he controlled and directed the various corporate entities used. It is not necessary to reach any conclusion as to whether, in his promotion of the Community, Mr Darwin's and his associates' actions were fraudulent or reckless. Nevertheless, it cannot be denied that, although the subscribers were induced to pay money on the basis that it would be held on trust, it is clear that in dealing with that money neither Mr Darwin nor his associates were inclined to perform the obligations which a trustee owes to beneficiaries.

16. At the hearing of this application, Ms Norman said that she had filed a notice of appeal against the primary judge's interlocutory orders above. She said that application was subsequently rejected by the primary judge. Since the orders were interlocutory orders, I take that to mean that the primary judge refused Ms Norman leave to appeal against those orders.

17. Because they repeat a number of the scandalous allegations mentioned by the primary judge against the liquidator and his firm, Vincents, it would be inappropriate to set out the terms of Ms Norman's five grounds of appeal. Nonetheless, it is quite apparent from their contents, and from a number of comments she made at the hearing of this application, that the present appeal marks a further attempt by her to review the primary judge's interlocutory judgment described above. The following observations demonstrate why

that is so. First, grounds of appeal 17 and 18 are, on their face, directed to Mr Darwin's conduct and certain allegations made against the lawyer employed by him. The use of the expression "suppressed by the Court" in ground of appeal 17 is an obvious reference to the statement made by the primary judge at [46] of his interlocutory reasons for judgment (set out at [14] above). Neither ground 17 nor 18 contains any express or implicit reference to the primary judgment under appeal. Next, ground of appeal 19 contains the same expression "suppressed". It, too, is plainly directed to the same statement mentioned above. Otherwise, it contains a number of allegations against the liquidator and his firm, which, as explained above, were all rejected by the primary judge in his interlocutory reasons for judgment. Ground of appeal 20 contains the possible exception mentioned above (at [9]). It refers to [63] of the primary judgment and asserts it states "falsely that assignment of the property to a constructive trust is the only possible equitable resolution of the matter". That paragraph is as follows:

> It must be kept in mind that the introduction of new members to the Community after the acquisition of the Property was an integral part of the scheme from the beginning. It was the intention of the Pre-Purchase Subscribers at the time of the purchase that new subscribers would become members of the Community and that their subscribed funds would be used for the maintenance and improvement of the land. It was also the intention of the Mortgage Subscribers that new members would be introduced and their funds would be used for maintenance and improvement. In other words, those who became members had the common intention to engage in a joint endeavour with the other members to establish the Community and continue it, intending that the subscriptions of each member would be applied to the purchase, maintenance and improvement of the Property, and that each member would have an interest in the Property. That common intention continued to exist at each stage when new members were invited to join the Community.

18. There is no mention of the subject matter raised by Ms Norman's ground of appeal in this paragraph. That being so, that ground of appeal could not identify any alleged error in the primary judgment. Moreover, the only paragraph of the primary judgment that appears to broach that issue is [172] as follows:

> It follows that the imposition of a constructive trust may well be warranted as a result of the unconscionable conduct of the Company or the Pre-Purchase Subscribers seeking to exclude the Mortgage or Post-Discharge Subscribers. On one view the circumstances may fall within the principles identified by McMillan J in *Imam Ali Islamic Centre*.

19. In this respect, it should be noted that, at the hearing of this application, Ms Norman pointed to a section of the *Real Property Act 1900* (NSW) which she claimed could be applied to provide relief if the fraud allegations against Mr Darwin were established. That may be so but, to obtain that relief, Ms Norman will need, first, to establish those allegations against Mr Darwin in her own proceeding. The interlocutory judgment did not prevent her from pursuing that course. It prevented her from attempting to introduce those issues into this proceeding. In this respect, it is also important to note two other things. First, Mr Darwin was not a party to the liquidator's application for directions before the primary judge. Secondly, his Honour's interlocutory judgment involved the exercise of a discretion directed, in no small part, to the just and efficient disposal of the liquidator's application.

20. Finally, I should mention that, at [21] of the grounds of appeal, Ms Norman asserts that she was denied natural justice by the primary judge. At the hearing of this application, she stated that it was not what was in the primary judge's primary judgment that constituted that denial, but rather what was excluded from it. This was an obvious reference to the interlocutory orders described above. It does not demonstrate any alleged error in the primary judgment.

21. For these reasons, I do not consider Ms Norman's notice of appeal has reasonable prospects of success. That is so, in summary, because it is essentially directed to correcting perceived error in the primary judge's interlocutory judgment and makes no real attempt to identify and correct any alleged error in the primary judgment. As is mentioned above, Ms Norman has already attempted to appeal the interlocutory judgment without success. Accordingly, the orders will be:

1. The notice of appeal filed on 17 July 2019 is dismissed.

2. The appellants are to pay the first defendant's costs of the application filed on 14 August 2019 and of this appeal to be taxed failing agreement.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:

Dated: 22 April 2020

SCHEDULE OF PARTIES

QUD 429 of 2019

Defendants

Fourth Defendant: STUART NEWMAN

Fifth Defendant: NORMA GEELIN MOU

Sixth Defendant: PHILLIP MORANDINI

Seventh Defendant: DEAN MOONEY

Eighth Defendant: CRAIG SCOTT

Article source: Federal Court of Australia

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Litigation history

Event		Collection	Date	Determination/status
Norman v Staatz, in the matter of Wollumbin Horizons Pty Ltd (in liq) [2020] FCA 521	◆	Federal Court of Australia	22 Apr 2020	
Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 3) [2019] FCA 924; 138 ACSR 231		Federal Court of Australia	20 Jun 2019	
Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 2) [2018] FCA 1419		Federal Court of Australia	13 Sep 2018	
Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) [2018] FCA 1090		Federal Court of Australia	11 Jul 2018	

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Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) (No 3) [2019] FCA 924; 138 ACSR 231	AH	Federal Court of Australia	20 Jun 2019	4 citations
Staatz v Berry, in the matter of Wollumbin Horizons Pty Ltd (in liq) [2018] FCA 1090		Federal Court of Australia	11 Jul 2018	2 citations: Para 4
Kimber v The Owners of Strata Plan No 48216 [2017] FCAFC 226; 258 FCR 575		Federal Court of Australia - Full Court	22 Dec 2017	2 citations: Para 62
Eliezer v University of Sydney [2015] FCA 1045; 239 FCR 381		Federal Court of Australia	21 Sep 2015	2 citations: Para 35-39
Kulik v Administrative Appeals Tribunal [2009] FCA 1324		Federal Court of Australia	16 Nov 2009	2 citations: Para 1

Legislation cited by this decision

Name	Citations
Corporations Act 2001 (Cth)	3 citations: Schedule 2 Section 45-1, 2 Section 90-15
Federal Court of Australia Act 1976 (Cth)	7 citations: Section 31A
Real Property Act 1900 (NSW)	2 citations
Trustee Act 1925 (NSW)	2 citations: Section 63, 93

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